
# Perspectives in Company Law and Financial Regulation

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# 10

# The renaissance of organized shareholder representation in Europe

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## I. Renaissance of shareholder voting rights and organized shareholder representation

### *A. Renaissance*

When Eddy Wymeersch retires, like a good farmer, he leaves us with plenty of crops. Although this is of course not the last harvesting season, these years are certainly particularly rich years in his garden. They are years of a renaissance of shareholder voting rights in Europe and, very prominent among them, shareholder voting via organized shareholder representation. There are at least three reasons for making such a statement.

The first is that one of Wymeersch's core statements in his extensive input to the large stream of European and worldwide corporate governance debate[1] has proven to be impressively right: he was one of the rather few who contributed to this debate in a truly international manner, based on the very extensive comparative law corpus, and who nevertheless did not succumb to the temptation to bet only on mechanisms of external corporate governance. Many of his writings on corporate governance – also early writings – could be summarized in short words as follows: despite the power of external corporate governance mechanisms, despite Wall Street rule and accounting law, 'do not forget

[1] See E. Wymeersch, 'Unternehmensführung in Westeuropa – ein Beitrag zur Corporate Governance-Diskussion', *Aktiengesellschaft,* 40 (1995), 299–316; K. Hopt and E. Wymeersch (eds.), *Comparative Corporate Governance – Essays and Materials*, (Berlin: Walter De Gruyter, 1997); K. Hopt, H. Kanda, M. Roe, E. Wymeersch and S. Prigge (eds.), *Comparative Corporate Governance – the State of the Art and Emerging Research*, (Oxford University Press, 1998); E. Wymeersch, 'Gesellschaftsrecht im Wandel – Ursachen und Entwicklungslinien' in S. Grundmann and P. Mülbert (eds.), *Festheft Klaus J. Hopt*, 'Corporate Governance – Europäische Perspektiven', *Zeitschrift für Gesellschaftsrecht,* 2 (2001), 294–324; *Id.* 'Factors and Trends of Change in Company Law', *International and Comparative Corporate Law Journal*, 4 (2000), 476–502.

shareholder voting rights'.[2] This is indeed the lesson to be learnt from the balance sheet scandals in the United States and then in various Member States.[3] The more mechanisms of external corporate governance show their flaws, the more a combination of external and internal mechanisms of corporate governance becomes attractive – and voting rights are paramount in this respect. The first reason for a renaissance of shareholder voting rights can therefore be summarized as 'back to Wymeersch's early *monita*!'

The second reason is that, of course, this trend has found its way into European legislation as well, and this in a prominent and in an astonishingly rapid way. It did not take more than one and a half years (from proposal to adoption), to enact the EC Directive on 'certain rights of shareholders', all related to shareholder voting (EC Shareholder Voting Directive).[4]

[2] See last footnote, *passim*, and, of course as well T. Baums and E. Wymeersch (eds.), *Shareholder Voting Rights and Practices in Europe and the United States*, (Kluwer Law International, 1999). On the other side, focusing mainly on mechanisms of external corporate governance: K. Hopt and E. Wymeersch (eds.), *Capital Markets and Company Law*, (Oxford University Press, 2003). For a large survey on the question which approach is stronger in which Member State(s), see early E. Wymeersch, 'Unternehmensführung in Westeuropa – Ein Beitrag zur Corporate Governance-Diskussion', *Aktiengesellschaft*, (1995), 299, 309–15 (namely Germany on the one hand, the United Kingdom on the other, France and Belgium in between).

[3] In this sense as well, for instance, early the *OECD Principles of Corporate Governance*, Part 1 II and 2 II; Committee on Corporate Governance, *The Combined Code – Principles of Good Governance and Code of Best Practice*, E 1, available at www.fsa.gov.uk/pubs/ukla/lr_comcode.pdf; and recently M. Siems, *Die Konvergenz der Rechtssysteme im Recht der Aktionäre*, (Tubingen: Mohr Siebeck, 2005), 102–5; N. Winkler, *Das Stimmrecht der Aktionäre in Europa*, (Berlin: De Gruyter, 2006), 1.

[4] European Parliament and Council Directive 2007/36/EC [2007] *OJ* L 184/17; Proposal of 5 Jan. 2006, *COM*(2005) 685 final. On this directive, see, among others: S. Grundmann and N. Winkler, 'Das Aktionärsstimmrecht in Europa und der Kommissionsvorschlag zur Stimmrechtsausübung in börsennotierten Gesellschaften', *Zeitschrift fürWirtschaftsrecht,* (2006), 1421–8; U. Noack, 'Der Vorschlag für eine Richtlinie über Rechte von Aktionären börsennotierter Gesellschaften', *Neue Zeitschrift für Gesellschaftsrecht,* (2006), 321–7; U. Noack and M. Beurskens, 'Einheitliche "Europa-Hauptversammlung"? – Vorschlag für eine Richtlinie über die (Stimm-) Rechte von Aktionären', *Gemeinschaftsprivatrecht,* (2006), 88–91; E. Ratschow, 'Die Aktionärsrechte-Richtlinie – neue Regeln für börsennotierte Gesellschaften', *Deutsches Steuerrecht,* (2007), 1402–8; J. Schmidt, 'Die geplante Richtlinie über Aktionärsrechte und ihre Bedeutung für das deutsche Aktienrecht', *Betriebs-Berater,* (2006), 1641–6; P. Wand and T. Tillmann, 'EU-Richtlinienvorschlag zur Erleichterung der Ausübung von Aktionärsrechten', *Aktiengesellschaft, (*2006), 443–50; D. Zetzsche, 'Virtual Shareholder Meetings and European Shareholder Rights Directive – Challenges and Opportunities', http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=357808;

The third reason is one more focused on organized shareholder representation already – not so much only on shareholder voting in general: For sceptics, it comes somehow as a surprise that, indeed, shareholder voting seems to increase considerably again. At least in Germany, over the last three years, the percentage of voting stock in the thirty largest listed companies which is in fact voted on general assemblies rose from 45.87% to 56.42%.[5] This increase is due to a large extent to organized shareholder representation.

### *B. The overall picture*

The EC Shareholder Voting Directive aims at enabling informed shareholder voting (see namely recitals 2, 4–6 and 9–12). The legislative history shows that this scope has received a more positive reaction throughout Europe than, for instance, such fundamental principles as 'one share one vote' – which the new Directive leaves untouched while the EC Takeover Directive, in its Arts. 10 and 11, had been only partially successful in establishing this principle as a European one at least in the more specific arena of takeovers.[6]

Instead, the EC Shareholder Voting Directive deals with more 'procedural' issues – some, however, of high practical importance and some of which had received an astonishingly high variety of answers before. The variety is evident in all three bundles of issues approached by the directive. The first bundle is about the preparatory phase, namely

D. Zetzsche, 'Shareholder Passivity, Cross-Border Voting and the Shareholder Rights Directive', *Journal of Corporate Law Studies*, 8 (2008), 283–336; critical M. Siems, 'The Case against Harmonisation of Shareholder Rights', *European Business Organization Law Review*, 6 (2005), 539–52.

[5] Deutsche Schutzvereinigung für Wertpapierbesitz, *HV-Präsenz der DAX-30-Unternehmen (1998–2007) in Prozent des stimmberechtigten Kapitals*, http://www.dsw-info.de/uploads/media/DSW_HV-Praesenz/2007_02.pdf. For figures in other countries, see for instance, Shearman&Stearling/ISS/ECGI, *Report on the Proportionality Principle in the European Union*, External Study Commissioned by the European Commission, http://ec.europa.eu/internal_market/company/docs/shareholders/study/final_report_en.pdf.

[6] European Parliament and Council Directive 2004/25/EC [2004] OJ L 142/12. On the long history (and importance) see e.g. S. Grundmann, *European Company Law – Organization, Finance and Capital Markets*, (Antwerp/Oxford: Intersentia, 2007), para. 995–1004. See also G. Ferrarini, 'One share – one vote: A European rule?', *European Company and Financial Law Review,* (2006), 147–77; for a short comparative law survey on the deviations from this principle in the large Member States see Grundmann, *ibid.*, paras. 452–54 (deviations stronger in France, the United Kingdom, and Scandinavia than in Germany and Italy).

questions of record date, information, and timing (see Arts. 4–7, also 9). The second is about voting by the shareholder himself. In these two bundles, the directive deals with: rendering information about the items on the agenda more easily accessible also from abroad; eliminating rules which block stock between the record date and the date of the general assembly; abolishing unnecessary requirements of physical presence in the general assembly (voting in absentia and voting via electronic media). The third bundle is about reducing restrictions to shareholder representation (proxies), and, of particular importance, (restrictions to) organized shareholder representation.

The variety existing so far in the Member States can well be shown by concentrating on just one bundle, the second one which, functionally, is already highly related to the third one: both voting in absentia (also by electronic means) and voting via (organized) shareholder representation allow for voting without shareholder presence, which, of course, often is excluded by reasons of costs, time etc.[7] Voting in absentia or by electronic means has, however, been extremely restricted so far even in countries which, such as Germany, were rather liberal with respect to shareholder representation and vice versa. This status could not really be justified by reasoning that one of the two ways of participation was already sufficient: a shareholder may rather opt for the expertise of the representative (and therefore not be satisfied by the possibility to vote in absentia) or he may rather mistrust him because of the danger of conflicts of interests (and therefore not be satisfied by the possibility of shareholder representation). The EC Directive, in principle, forces Member States to allow companies to take all measures necessary to enable shareholders to vote in absentia, by electronic means or by letter (Art. 8, 12), and it forces the Member States to allow for a free choice among the different forms of organized shareholder representation and impose this as well on the companies (Arts. 10, 11, 13).

There is quite considerable change required – in various Member States – already with respect to the second bundle of rules named above.

[7] G. Bachmann, 'Verwaltungsvollmacht und "Aktionärsdemokratie" – Selbstregulative Ansätze für die Hauptversammlung', *Aktiengesellschaft,* (2001), 635, 637; W.W. Bratton and J.A. McCahery, 'Comparative Corporate Governance and the Theory of the Firm: The Case against Global Cross Reference', *Columbia Journal of Transnational Law*, 38 (1999), 213, 260; T. Baums and Ph. v. Randow, 'Der Markt für Stimmrechtsvertreter', *Aktiengesellschaft,* (1995), 145, 147; J.C. Coffee, 'Liquidity Versus Control: The Institutional Investor As Corporate Monitor', *Columbia Law Review,* 91 (1991), 1277; U. Noack, 'Die organisierte Stimmrechtsvertretung auf Hauptversammlungen', *Festschrift for Lutter,* (2000), 1463.

The comparative law status so far shows substantial variety and can be summarized as follows: in Germany, voting in absentia is not permitted today, neither by letter nor by electronic media. Functionally, however, it can be seen as an equivalent to have a representative in the general meeting, follow the meeting on the internet and give instructions to the representative contemporaneously via electronic media.[8] Also in the United Kingdom, electronic means could be used only to give proxy. Conversely in France, voting by letter is possible.[9] In Italy, at least in listed companies, a vote is possible in absentia if the statutes so provide (Art. 127 Testo Unico), probably also by electronic communication or via videoconference.[10] The EC Shareholder Voting Directive now forces Member States to allow companies to choose themselves whether they want to provide the facilities for voting in absentia, by electronic means and/or by letter (Art. 8, 12).[11] The scope of these rules is summarized in its 6th Recital saying that all 'shareholders should be able to cast informed votes at, or in advance of, the general meeting, no matter where they reside'.

## II. Organized shareholder representation as a centre-piece of the development

The following will show that there is quite considerable change required as well – in other Member States – with respect to organized shareholder representation (third bundle of rules named above, see below). A legislature may, however, opt as well for reforming quite substantially his law on organized shareholder representation more generally. This is so in the case of the proposal now discussed in Germany in the

[8] Permissible, see, for instance: G. Spindler, in K. Schmidt and M. Lutter (eds.), *Aktiengesetz*, (2007), § 134 para. 56.

[9] Art. L 225–107 [L = Code de Commerce (Loi, L), Annexe à l'ordonnannce n° 2000–912 du 18 septembre 2000, Livre II, Des Sociétes Commerciales et des Groupements d'interêt économique, last amendment (Nouvelles Régulations Économiques) J.O. 2001, 7776]; M. Cozian, A. Viandier and F. Deboissy, *Droit des Sociétés*, (Paris: Litec, 2001), para. 847; Y. Guyon, *Droit des affaires, vol. 1: Droit commercial général et Sociétés*, (Paris: Economica, 2001), para. 301–1 and 301–2 (for the Code de Commerce as legal basis see there para. 27, 95); since 2001 electronic voting and voting via video conference are accepted (Art. L 225–107 para. 2).

[10] On all this (and on the disputed question whether this rule applies to other PLCs as well): L. Picardi, 'L'articolo 127 del Tuf', in G.F. Campobasso (ed.), *Testo Unico della Finanza – Commentario*, (Utet, 2002), Art. 127 para. 10.

[11] The Proposal for a Fifth EC Company Law Directive still did not contain rules on voting in absentia; see e.g. M. Pannier, *Harmonisierung der Aktionärsrechte in Europa – insbesondere der Verwaltungsrechte*, (Duncker & Humblot, 2003), 136.

context of the transposition of the EC Shareholder Voting Directive.[12] This proposal concerns the parts which will play a role in the following. Indeed, the German legislature proposes to do more than is required in the directive and this mainly with respect to organized shareholder representation. Eddy Wymeersch has always had a particular eye on new developments – and often has initiated them himself. Therefore, it may not bother him too much that it is still highly uncertain whether the parts of this proposal discussed in the following will be enacted at all (or only the parts strictly necessary for the transposition).

### *A. High density of regulation and admission of all forms*

The reason why the focus is on organized shareholder voting representation in the following is simple. In practice, this is by far the most important way of shareholder voting.[13]

This finding is by now means new. Already, the Proposal for a Fifth Directive, had dealt with this issue rather extensively. This is true even though organized proxy – the proposal calls it 'publicly invit[ing] shareholders to send their forms of proxy to him and . . . offer[ing] to appoint agents for them'[14] – is not yet prescribed as a possibility in this

[12] See, on the one hand: [Ministry of Justice] *Referentenentwurf eines Gesetzes zur Umsetzung der Aktionärsrechterichtlinie (ARUG)*, www.bmj.bund.de/files/-/3140/RefE%20Gesetz% 20zur% 20Umsetzung%20der%20Aktionärsrechterichtlinie.pdf; on this proposal U. Seibert, 'Der Referentenentwurf eines Gesetzes zur Umsetzung der Aktionärsrechterichtlinie (ARUG)', *Zeitschrift für Wirtschaftsrecht,* (2008), 906–10. See, on the other hand: [Federal Government] *Entwurf eines Gesetzes zur Umsetzung der Aktionärsrechterichtlinie (ARUG)*, BR-Drs. 847/08, as of 7 November 2008. This second proposal could be taken into account only after this chapter was completed.

[13] In 1992, up to 99% of the capital present at the general meeting was represented by financial institutions which typically acted as proxies for their clients, see T. Baums, 'Vollmachtstimmrecht der Banken – Ja oder Nein?', *Aktiengesellschaft, (*1996), 11, 12. The newest trend would seem to be that independent service providers (ISS, ECGS, IVOX) offer proxy voting services, see U. Schneider and H.M. Anziger, 'Institutionelle Stimmrechtsberatung und Stimmrechtsvertretung – "A quiet guru's enormous clout"', *Neue Zeitschrift fürGesellschaftsrecht,* (2006), 88–96.

[14] This refers to proxies given to banks, the management or shareholder associations: J. Temple Lang, 'The Fifth EEC Directive on the Harmonization of Company Law – Some Comments from the Viewpoint of Irish and British Law on the EEC Draft for a Fifth Directive Concerning Management Structure and Worker Participation', *Common Market Law Review*, 12 (1975), 345, 366; Pannier, *Harmonisierung der Aktionärsrechte in Europa*, 135 *et seq.*; G. Schwarz, *Europäisches Gesellschaftsrecht – ein Handbuch für Wissenschaft und Praxis*, (Baden-Baden: Nomos, 2000), para. 767; C. Striebeck,

proposal.[15] If, however, a Member State allowed organized shareholder voting, already the Proposal of a Fifth Directive would have imposed certain important conditions (Art. 28)[16] with a view to increase the chances that the intentions of shareholders really come to bear: when making the public offer, the representative would have had to propose one method of voting for each item on the agenda, diverging instructions by the shareholder would have had to be rendered possible for each item separately and this would have had to be mentioned explicitly. Moreover, the proxy would have had to be restricted to one meeting only (as formerly in Germany the proxy to banks, the so-called 'deposit-bank voting right') and revocable. This would already have constituted a framework – despite the considerable differences between the (big) Member States.[17]

Today, long after the Proposal has been withdrawn, this only helps to understand which importance has been attached to organized shareholder representation since very early on the European level. In the EC Shareholder Voting Directive, even the starting point has changed and it has done so very radically: this Directive now obliges Member States to allow all forms of organized shareholder representation. In fact, Art. 10 of the directive eliminates all obstacles to organized shareholder representation which are not specified in its first two paragraphs (legal capacity and maximum number of representatives, with further specifications in Art. 13) and, in addition, allows certain restrictions of the use of the proxy in case of conflicts of interests in its para. 3 – not more. Thus, the EC legislature goes further than for

*Reform des Aktienrechts durch die Strukturrichtlinie der Europäischen Gemeinschaften*, Broschiert, (1992), 85–99.

[15] EC Commission's explanation to Art. 28 (*COM*(72) 887 final). This is now a core ingredient in the EC Shareholder Voting Directive 2007/36/EC, [2007] *OJ* L 184/17.

[16] In more detail on these conditions see EC Commission's explanation to Art. 31 (*COM*(72) 887 final); Lang, 'The Fifth EEC Directive on the Harmonization of Company Law', 345, 366; Schwarz, 'Europäisches Gesellschaftsrecht', (note 14, above), para. 767; Striebeck, 'Reform des Aktienrechts', (note 14, above), 87 *et seq.*

[17] Short comparative law surveys in the following text; and T. Baums, 'Shareholder Representation and Proxy Voting in the European Union: A Comparative Study' in K. Hopt, H. Kanda, M. Roe, E. Wymeersch and S. Prigge (eds.), *Comparative Corporate Governance – the State of the Art and Emerging Research*, (Oxford University Press, 1998), 545–64; Th. Behnke, 'Die Stimmrechtsvertretung in Deutschland, Frankreich und England', *Neue Zeitschrift für Gesellschaftsrecht,* (2000), 665–74; and also *DSW-Europastudie – 15 europäische Länder im Vergleich, eine rechtsvergleichende Studie über Minderheitenrechte der Aktionäre sowie Stimmrechtsausübung und -vertretung in Europa*, (1999), 86 *et seq.*; and many contributions to T. Baums and E. Wymeersch (eds.), *Shareholder Voting Rights,* (note 2, above) (entry: proxies).

voting in absentia (second bundle of rules) where it obliges Member States only not to hinder companies from installing such possibilities (Arts. 8 and 12).

### *B. High diversity in member state laws so far*

Proxy rules (both on general and organized proxy) are regulated quite differently in different Member States so far. In Germany, proxy has always been regulated in quite a liberal way, and as of 2002 the NaStraG has admitted board members as proxies as well (§ 134 para. 3(3) *Aktiengesetz*; however, probably not the PLC itself).[18] Proxy has to be given in writing (the company statutes can deviate, § 134 para. 3(2) *Aktiengesetz*), may be given without time limits, but may not be irrevocable.[19] The NaStraG also abolished the time limit for proxies given to banks (see § 135 para 2(2) *Aktiengesetz*).[20] This is ambivalent: banks are subject to conflicts of interests (albeit often not more than management), but the presence of shareholdings in

[18] See, for instance G. Bachmann, 'Verwaltungsvollmacht und "Aktionärsdemokratie" – Selbstregulative Ansätze für die Hauptversammlung', *Aktiengesellschaft, (*2001), 635–44; S. Hanloser, 'Proxy-Voting, Remote-Voting und Online-HV – § 134 III 3 AktG nach dem NaStraG', *Neue Zeitschrift für Gesellschaftsrecht*, (2001), 355–58; U. Seibert, 'Aktienrechtsnovelle NaStraG tritt in Kraft – Übersicht über das Gesetz und Auszüge aus dem Bericht des Rechtsausschusses', *Zeitschrift für Wirtschaftsrecht,* (2001), 53, 55 *et seq.*; see also U. Noack, 'Die organisierte Stimmrechtsvertretung auf Hauptversammlungen', *Festschrift for Lutter*, (2000), 1463, 1474–80; comparative law investigations into (organized) proxies: Baums, 'Shareholder Representation', (note 17, above), 545–564; B.C. Becker, *Die Institutionelle Stimmrechtsvertretung der Aktionäre in Europa,* (Frankfurt am Main: Lang, 2001); Behnke, 'Die Stimmrechtsvertretung', (note 17, above), 665–74; M. Hohn Abad, *Das Institut der Stimmrechtsvertretung im Aktienrecht – ein europäischer Vergleich*, (1995); also J. Hoffmann, *Systeme der Stimmrechtsvertretung in der Publikumsgesellschaft – eine vergleichende Betrachtung insbesondere der Haftung des Stimmrechtsvertreters im deutschen und US-amerikanischen Recht*, (Nomos, 1999).

[19] U. Hüffer, *Aktiengesetz* (8th edn 2008), § 134 AktG para. 21; J. Reichert and S. Harbarth, 'Stimmrechtsvollmacht, Legitimationszession und Stimmrechtsausschlußvertrag in der AG', *Aktiengesellschaft,* (2001), 447–55.

[20] See U. Seibert, 'Aktienrechtsnovelle NaStraG tritt in Kraft – Ubersicht über das Gesetz und Auszüge aus dem Bericht des Rechtausschusses', *Zeitschrift für Wirtschaftsrecht,* (2001), 53, 54–6; M. Weber, 'Der Eintritt des Aktienrechts in das Zeitalter der elektronischen Medien – das NaStraG in seiner verabschiedeten Fassung', *Neue für Zeitschrift Gesellschaftsrecht,* (2001), 337, 343; not very common in other countries, see references in Grundmann, *European Company Law*, (note 6, above), § 14 N. 66.

the meeting is increased.[21] Today, there is another restriction on the proxy given to a bank: the bank may not use it if the bank itself holds (and votes) 5% of the company's capital (§ 135 para. 1 (3) *Aktiengesetz*, except for those proxies containing explicit instructions). Moreover, under specific information rules it is made clear how the bank will vote and that the client can deviate for each item individually (§§ 128 para. 2, 3, 135 para. 5 *Aktiengesetz*). In any case, the bank must take the client's interest as a guideline and try to avoid conflicts of interests as far as possible.[22] The French solution is much more restricted: proxies can be given only to other shareholders or the spouse[23] and only for one meeting and in writing, and revocation must remain possible.[24] Organized proxy is typically given to management (mostly in blank).[25] Proxy given to banks – if they do not own stock – would contradict the basic principle of accepting only other shareholders as proxies, in any case, the law does not provide for it.[26] Particularly developed are the bases for organized shareholder representation in the United Kingdom where proxy is not confined to other shareholders (although possible only for polls).[27] Proxy can be given in writing or (as of 2000) in electronic form.[28] Organized proxy is possible without giving specific instructions (general proxy) or with them, and also

[21] On this advantage (and on the problem of concentrating power in banks and conflicts of interests): Baums, 'Germany' in T. Baums and E. Wymeersch (eds.), *Shareholder Voting Rights* (note 2, above), 127; and more extensively Hohn Abad, *Das Institut der Stimmrechtsvertretung*, 109 (note 18, above), 13–17; Behnke, 'Die Stimmrechtsvertretung in Deutschland, Frankreich und England', (note 17, above), 667. On existing conflicts of interests see also short explanations in Grundmann, *European Company Law*, (note 6, above), para. 504 *et seq.*

[22] § 128 para. 2 (2) *Aktiengesetz* (German PLC-Code); in the event of unavoidable conflicts there is a duty nevertheless to act in the sole interest of the client, see references in Grundmann, *European Company Law*, (note 6, above), § 12 N. 78.

[23] Art. L 225–106 [L = Code de Commerce, see above N. 9]; critical Guyon, *Droit des affaires*, (note 9, above), para. 301.

[24] Art. D 132 [D = Décret (D) n° 67–236 du 23 mars 1967 sur les sociétes commerciales; see note 3, above]; Guyon, *Droit des affaires*, (note 9, above), para. 301; Behnke, 'Die Stimmrechtsvertretung ', (note 17, above), 668.

[25] Art. L 225–106; Cozian, Viandier and Deboissy, *Droit des Sociétés,* (note 3, above) para. 838; Guyon, *Droit des affaires*, (note 9, above), para. 301.

[26] Y. Guyon, in T. Baums and E. Wymeersch (eds.), *Shareholder Voting Rights*, (note 2, above), 35, 106.

[27] Sec. 372 (old) Companies Act (C.A.), sec. 59 Table A; P. Davies, *Gower's and Davies' Principles of Modern Company Law*, (4th edn, Thomson, 2003), 361 and 363; J. Farrar and B. Hannigan, *Farrar's Company Law*, (7th edn, Lexis Law Publishing, 1998), 315, 322 *et seq.*; R.R. Pennington, *Pennington's Company Law*, (8th edn, LexisNexis UK, 2001), 766, 779 *et seq.*

[28] Sec. 372 II para. 2 (old) C.A.; sec. 60 *et seq.* Table A.

for only a few of the items on the agenda (two-way proxy).[29] In listed companies, only the latter is accepted.[30] When management asks for proxies (i.e. unless the initiative came from the shareholder) it must ask all shareholders.[31] In Italy, there are rather rigid formal requirements for proxies (in written form, not in blank). Moreover, a proxy can represent only small capital and the company statutes can provide for more restrictions; as of 1998, banks may ask for proxies (within these limits), board members and auditors still not; and in listed companies, (associations of) shareholders holding more than 1% of the stock, can broadly ask for proxies.[32]

Summarizing the status quo so far, the starting point is similar: proxies are possible in all countries. There are, however, substantial differences so far in very important single questions: in Germany and the United Kingdom, the proxy can be chosen freely, in France only from among other shareholders and spouses and in Italy only for small capital being represented. A proxy without time limits is possible in Germany, and also in the United Kingdom if the statutes so provide. Organized proxies follow different traditions – in Germany proxies are typically given to banks, in France and Great Britain to management and in Italy only to a very restricted extent. Proxies given to depositary banks are, however, more important for bearer shares[33] and registered stock, which predominates in France and the United Kingdom, may well become more important in Germany as well.

[29] Sec. 60 *et seq.* Table A; Davies, *Gower's and Davies' principles*, (note 27, above), 360 *et seq.*; Farrar and Hannigan, *Farrar's Company Law*, (note 27, above), 315 *et seq.*; also Pennington, *Pennington's Company Law*, (note 27, above), 782.

[30] On this question (and on the duty to vote which then probably exists): Davies, *Gower's and Davies' principles,* (note 27, above), 360–63; Farrar and Hannigan, *Farrar's Company Law,* (note 27, above), 315 *et seq.*; Pennington, *Pennington's Company Law*, (note 27, above), 782 *et seq.*; Behnke, 'Die Stimmrechtsvertretung ' , (note 17, above), 670.

[31] Davies, *Gower's and Davies' principles*, (note 27, above), 361; Farrar and Hannigan, *Farrar's Company Law,* (note 27, above), 316; Pennington, *Pennington's Company Law,* (note 27, above), 767.

[32] The relevant rules are Art. 2372 Codice Civile and Art. 136–144 Testo Unico della Finanza; on all this P. Marchetti, G. Carcano and F. Ghezzi, 'Shareholder Voting in Italy' in T. Baums and E. Wymeersch (eds.), *Shareholder Voting Rights*, (note 2, above), 171–79.

[33] T. Baums, 'Corporate Governance in Germany: The Role of the Banks', *American Journal of Comparative Law,* 40 (1992), 503, 506; M. Hüther, 'Namensaktien, Internet und die Zukunft der Stimmrechtsvertretung', *Aktiengesellschaft,* (2001), 68, 69 *et seq.*; Noack, 'Die organisierte Stimmrechtsvertretung', (note 18, above), 1466.

## III. Structuring organized shareholder representation – three Cartesian rules

For a 'market order' for organized shareholder representation, three types of rules would seem to develop in Europe – all of them aimed at containing dangers resulting from this type of proxy while profiting from its advantages. The trend is to allow for competition between all forms of organized shareholder representation, i.e. admit them all and subject them to the same or similar safeguards, and to target safeguards more carefully. The German scheme of deposit-bank voting right (§ 135 *Aktiengesetz*) and the English scheme of proxies given to management would seem to be particularly refined. For the former, as has been mentioned, the Ministry of Justice and now also the Federal Government have published reform proposals (N. 12) with three major changes. The English scheme is brand-new anyhow after the adoption of the Company Law Reform.[34] The three basic types of rules developing in Europe are about (i) having an uninterested, professional representative, (ii) providing, as far as possible, the full picture of the market of proposals (proxies) to the shareholder, and (iii) reducing the representative's strategic options via a mandatory vote:

### *A. Striving for an uninterested, professional representative*

#### 1. Impartiality v. specific shareholder instructions

The first Cartesian rule developing in Europe for organized shareholder representation would seem to be that it is advisable and permissible for national law to strive for an uninterested, professional representative. The EC Shareholder Voting Directive, while not regulating safeguards in this respect positively, does nevertheless foster them in Art 10 para. 3. In fact, professional representatives are more likely to have the knowledge to cast the vote in the best interest of the shareholder represented. This advantage of the use of an information intermediary[35] has to be set off against the disadvantage that there is often a danger of conflict of interests.

[34] See, for instance, P. Davies, *Gower and Davies, Principles of Modern Company Law*, (7th edn, London: Sweet & Maxwell, 2008), 53–62.

[35] For the concept of information intermediaries, advantages and disadvantages (chances and dangers) of their use see more in detail S. Grundmann and W. Kerber, 'Information Intermediaries and Party Autonomy – the example of securities and insurance markets' in: S. Grundmann, W. Kerber and S. Weatherill (eds.), *Party Autonomy and the Role of Information in the Internal Market*, (Berlin: De Gruyter, 2001), 264–310 (and literature quoted there).

Theoretically, two rules seem feasible: either a rule which requires the absence of conflicts of interests (impartiality) and excludes all representatives who do not satisfy this requirement; or a rule which asks for specific instructions on the side of the shareholder in cases where there is a considerable conflict of interests. Already before the adoption of the EC Shareholder Voting Directive, the rule named first would seem to have been a rather theoretical option only. Both Germany and the United Kingdom where this problem was approached with particular intensity opted for the second rule in principle.

In Germany, this was done in § 135 para. 1 (2) *Aktiengesetz* for any proxy given to management in the general assembly of PLC: While this rule applies directly only to (general assemblies of) credit institutions which adopt the form of a PLC, it is increasingly held to apply by analogy to all types of enterprises adopting the form of a PLC.[36] Moreover, § 135 para. 1 (3) *Aktiengesetz* asks for special instructions – i.e. two-way proxies in the English terminology – in cases where proxy is not given to management of the PLC, but to the deposit-bank , if this bank owns in addition 5% of the stock subscribed.

Deposit bank voting is, however, not possible so far in France (unless it owns stock itself), only to a very limited extent in Italy and not usual in the United Kingdom either. Here, as has been said, proxies are given to management (as in France). The peculiarity of the English development is, however, that proxies can be given without specific instructions (general proxies) only in PLCs which are not listed, while in listed companies two-way proxies are needed: Proxies can be voted here only for those items on the agenda where such instructions exist.

### 2. Management, credit institutions, and shareholders' associations as potential representatives

The question thus arises not so much whether there should be the requirement of a specific instruction by the shareholder but whether all forms of organized representation should be admitted in parallel and

[36] See only (also for the opposing view) C. Bunke, 'Fragen der Vollmachtserteilung zur Stimmrechtsausübung nach §§ 134, 135 AktG', *Aktiengesellschaft,* (2002), 57, 60; M. Habersack, 'Aktienrecht und Internet', *Zeitschrift für das gesamte Handelsrecht,* 165 (2001), 172, 187–89; S. Lenz, *Die gesellschaftsbenannte Stimmrechtsvertretung (Voting) in der Hauptversammlung der deutschen Publikums-AG*, (Berlin: Duncker & Humblot, 2005), 285; U. Noack, 'Stimmrechtsvertretung in der Hauptversammlung nach dem NaStraG', *Zeitschrift für Wirtschaftsrecht,* (2001), 57, 62; G. Spindler, in K. Schmidt and M. Lutter (eds.), *Aktiengesetz*, (2007), § 134 para. 56; opposite, for instance, P. Kindler, 'Der Aktionär in der Informationsgesellschaft', *Neue Juristische Wochenschrift,* (2001), 1678, 1687.

how to define the conflict of interests which gives rise to the requirement of a specific instruction by the shareholder.

While this seems rather simple in the case of proxies given to management or to representatives named by the company – at least in PLCs which are listed – the German rule described above is more problematic. It basically assumes that there is a strong conflict of interest whenever the deposit bank owns 5% of the stock subscribed, but does not take into consideration loans (although in 1998 this had been discussed as well). This rule which has been introduced after long policy debate in the 1990s about the power of banks and their role within the then highly 'cartelized' system of stock-holdings in Germany, the so-called 'Deutschland AG' (PLC Germany), was aimed at combating a different type of conflict of interests: while the potential of bias in the case of management is obvious, that of the bank is seen in four phenomena: deposit banks do not only act as representatives of their clients, but, in a universal bank system, act as well as providers of loans, as owners of their own stock and via their presence on the supervisory board, potentially as well as counsellors.[37] Their conservative – risk averse – attitude in the PLCs which they influence by their votes has often been highlighted. Moreover, interests of large block-holders often diverge from that of small capital represented.

Two developments in the last two years are interesting. The German legislature would like to increase the threshold from which specific instructions are required from 5% to 20% (Federal Government) or even 50% (Ministry of Justice). In fact, the 5% threshold has often been criticized as being much too low and meaningless.[38] Another argument advanced by the legislature is that deposit banks have lost quite substantially the multifold power described.[39] While the German legislature has admitted proxies given to management (only) in 2002, the legislative trend would now seem to be that deposit bank voting is seen (again) as the alternative which should be fostered. Banks are seen

[37] D. Charny, 'The German Corporate Governance System', *Columbia Business Law Review*, 1 (1998), 145; K. Hopt, 'Gemeinsame Grundsätze der Corporate Governance in Europa?', *Zeitschrift für Gesellschaftsrecht,* (2000), 773, 802–6.

[38] See, for instance, G. Spindler, in K. Schmidt and M. Lutter (eds.), *Aktiengesetz*, (2007), § 135 para. 20–22.

[39] Even in the 1990s, the share banks owned in listed companies on average was only at about 10% of the stock subscribed: E. Wymeersch, 'A Status Report on Corporate Governance Rules and Practices in Some Continental European States' in K. Hopt , H. Kanda, M. Roe, E. Wymeersch and S. Prigge (eds.), *Comparative Corporate Governance*, (note 1, above), 1176 *et seq.* (similar, however, only in Italy).

(again) as potentially less biased than management – as an interesting balancing factor in a general assembly.

The second development occurred on the European level. The EC Shareholder Voting Directive does not accept a general exclusion of certain types of (organized) shareholder representation, namely not requirements as to which person may be chosen as a proxy. An exclusion of banks is thus no longer admissible (see Art. 10). Moreover, the requirements which may be imposed are channelled now: apart from exclusion based on questions of capacity (para. 1) and restrictions as to numbers (para. 2), only conflicts of interests may be taken as a criterion for restrictions (para. 3). In addition, these restrictions then may not take any form, namely not outright exclusion: it may only be forbidden to pass on the proxy or prescribed to give information on the conflict of interests. The third – and last remaining – tool is that specific instruction by the shareholder may be asked. Finally, also a definition of conflict of interests is given. Although this definition is open ('in particular'), it shows a trend: it would seem as if only (direct or indirect) majority holdings were seen as serious enough a danger. Thus, what the German legislature now proposes may even be required by the Directive (although the German legislature does not think he is bound).

Shareholders' associations would certainly be the least problematic alternative – if there was not the problem that a high level of professional action requires funds as well. Therefore, the real alternative is commercial representation, ISS, ECGS and IVOX being the most prominent players in this respect (see Fn. 13).

### 3. Striving for a full picture of the market of proposals (proxies)

Specific instructions given by the shareholder are seen as the first best choice in all national laws and in the EC Shareholder Voting Directive. This follows from the fact that such instructions are required in situations where shareholder protection is seen to be particularly important (see, for instance, Art. 10 para. 3 of the directive) and from the fact that they always take precedence over proposals made by management or organized shareholder representatives (Art. 10 para. 2 of the directive). The EC Shareholder Voting Directive does, however, not specify how and which proposals should be made and which effect they have in the absence of such specific instructions.

This is perhaps the most interesting aspect of the reform proposal made by the German Ministry of Justice for the German deposit bank voting scheme, and deserves close attention – even though the chance for this model to become law has now considerably decreased, as it is no longer part of the Federal Government's draft.[40] The first rule proposed is that the credit institution is no longer forced to make its own proposal of how to vote in the absence of a specific shareholder instruction, but that it is still allowed to do so. The second rule is that if the credit institution chooses not to make its own proposal, it may not only propose to follow management's proposals. This is interesting because the rule clearly starts from the assumption that the risk of biases in management's proposals is the strongest. This shows that with respect to the question of who is the ideal proxy, the dividing line within Europe is probably not less prominent than with respect, for instance, to co-determination. The credit institution may refer to the proposal made by any shareholders' association, but if it refers to the proposals made by management, it always has to offer as an alternative at least one proposal made by a shareholders' association as well. The bottom line is that – absent a specific instruction made by the shareholder – credit institutions may act as proxies only if they offer an alternative to management's proposals – which, of course, can also coincide with these proposals in large parts – but they have to make the choices made explicit. In other words, the credit institution has to offer its own alternative to management's proposals or an alternative proposed by another independent 'professional' actor – because this should have ex ante a disciplining effect on management.[41] Weakening this responsibility of the credit institution is a major back-step in the recent Government's *Entwurf* (see note 12, above). The third rule in the Ministry's *Entwurf* is that the credit institution may even choose to offer the shareholder the whole picture of proposals. This goes even further than just disciplining management. A (relatively) independent professional actor gathers all alternative proposals for the shareholder[42] (even so far, credit institutions had to inform about the existence of alternatives and this remains the mandatory rule also in the future). The Ministry's *Entwurf* would have had more control than the Government's *Entwurf*.

[40] On the model, see [Ministry of Justice] *Referentenentwurf* (note 12, above), 48 *et seq*.; first comment by M. Sauter, 'Der Referentenentwurf eines Gesetzes zur Umsetzung der Aktionärsrechterichtlinie (ARUG)', Institute for Law & Finance, Frankfurt, Working Paper Series No. 85, 06/2008, www.ILF-Frankfurt.de, 4 *et seq* and 17 (overall positive). [Federal Government] *Entwurf* (see note 12, above), provides for a different model, see S. Grudmann, 'Das neue Depotstimmrecht nach der Fassung im Regierungsentwurf zum ARUG', forthcoming in *Zeitschrift für Bank- und Kapitalmarktrecht*, issue 1 (2009).

[41] See [Ministry of Justice] *Referentenentwurf*, (note 12, above), 48.

[42] See [Ministry of Justice] *Referentenentwurf*, (note 12, above), 49.

### *B. Striving for the reduction of representative's strategic options – the mandatory vote*

More questionable may be another proposal of deregulation made in Germany.

So far, § 135 para. 10 *Aktiengesetz* forced credit institutions, if at all they offered themselves as organized shareholder representatives, to do so for all their clients. A very similar rule – now for the management – is to be found in English Company Law where management, if it asks for proxies (i.e. unless the initiative came from the shareholder), must ask all shareholders (see Fn. 31). Conversely in Germany, most authors are opposed to an analogous application of said § 135 para. 10 *Aktiengesetz* to management's solicitation of proxies.[43] Thus in Germany, there is no equal treatment or level playing field between these two forms of organized shareholder representation. The rationale behind the rules in the United Kingdom and in Germany is similar: the organized shareholder representative should not be able to exclude those shareholders in fact who are likely to be opposed to the proposals made by the representative.[44] As there is an offer to act as a proxy already, the burden of this duty is low. In Germany it is even further reduced by the fact that the duty is owed only to other clients – not all shareholders – and only if the credit institution has an establishment at the place where the general assembly takes place. Thus, additional burden is in fact avoided. Under these circumstances, the gains from deregulation would seem to be minimal and the policy considerations in favour of equal treatment of shareholders and the trend in Europe go into the opposite direction.

## IV. Conclusions

With the transposition of the EC Shareholder Voting Directive, Europe not only develops some basic rules for a level playing field in the core area of organized shareholder representation, namely: (i) any outright exclusion of one or the other type of organized shareholder representation is prohibited (open competition between the different forms); (ii) the grounds on which regulation or restrictions for such organized

[43] U. Hüffer, *Aktiengesetz*, (2008), § 135 AktG para. 32; G. Spindler, in K. Schmidt and M. Lutter (eds.), *Aktiengesetz*, (2007), § 135 para. 45; W. Zöllner, in *Kölner Kommentar Aktiengesetz*, (1979), § 135 para. 103.

[44] Explanation to the *Aktiengesetz* 1965, Regierungsbegründung Kropff, 200; U. Hüffer, *Aktiengesetz*, (2008), § 135 AktG para. 32; G. Spindler, in K. Schmidt and M. Lutter (eds.), *Aktiengesetz*, (2007), § 135 para. 44.

representation may be based are substantially reduced; (iii) there is a clear priority rule for specific instructions made by shareholders. With the transposition of the EC Shareholder Voting Directive, however, Europe also seems to enter into a new phase of competition between different designs of organized shareholder representation. Germany has made highly interesting reform proposals for its deposit bank voting scheme which deserve discussion in their underlying rationale. They are an original input to a debate which follows Eddy Wymeersch's *monitum*: 'do not forget shareholder voting rights'.